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Appendix.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

APPEARANCES.

For plaintiff:

Henry W. Sawyer, III
David P. Bruton

(Duane, Morris & Heckscher for applicant for intervention as deft. Pennsylvania Association of Independent Schools)

For defendant:

J. Shane Creamer for David H. Kurtzman, Grace M. Sloan

Semisch & Commons, 408 N. Easton Rd., Willow Grove, Pa. 19090 for Phila. Montgomery Christian Academy

Samuel Rappaport for Akiba Hebrew Academy & Beth Jacob School of Phila.

William B. Ball—Joseph G. Skelly, 127 State St., Harrisburg, Pa. 17101 for Archbishop Wood High School for Girls

James E. Gallagher Jr.—C. Clark Hodgson, Jr., for St. Anthony's Roman Catholic Church School and Ukrainian Catholic Holy Ghost School

F. Raymond Heuges for Germantown Lutheran Acad.

DOCKET ENTRIES.

Aug. 6, 1971. Motion for Summary Judgment and Permanent Injunction, filed.

Aug. 9, 1971. Certified copy of Judgment received from Supreme Court of US that judgment of this court is reversed with costs and cause is remanded for further proceedings in conformity with opinion, further ordered that appellants Lemon et al recover for Kurtzman, the sum of $1,334.80, for their cost, filed. 8/9/71 entered and copies to Judges Troutman, Luongo & Hastie.

Aug. 13, 1971. Defts motion for denial of plffs motion for summary judgment and permanent injunction, filed.

Aug. 13, 1971 Defts motion re framing of injunction, filed.

Aug. 13, 1971. Defts motion to stay further proceedings, filed.

Aug. 16, 1971. Motion of Intervenor Defendant Penna. Assoc. of Independent Schools motion for denial of plffs motion for summary judgment and permanent injunction, filed.

Aug. 16, 1971. Motion of Penna. Assoc. of Independent Schools to stay further proceedings, filed.

Aug. 16, 1971. Motion of Penna. Assoc. of Independent Schools re framing of injunction, filed.

Aug. 16, 1971. Plffs consent to stay of further proceedings, filed.

Aug. 16, 1971. Plffs answer to defts motion re framing of injunction, filed.

Aug. 19, 1971. Order of Court (dated 8/18/71) GRANTING defts motion (#55), and staying all proceedings, etc., pending disposition of appellees petition for rehearing, etc., by the U. S. Supreme Court, filed. (Hastie, Luongo & Troutman, JJ.) (8/19/71 entered and copies mailed).

Aug. 31, 1971. Answer of Penna. Assoc. of Independent Schools to plffs' new matter, filed.

Oct. 6, 1971. Defts motion to modify order for stay of proceedings and to schedule oral argument, filed.

Nov. 26, 1971. Brief in support of defts motion re framing of injunction, filed.

Nov. 30, 1971. Plffs' memorandum in opposition to defts motion re: framing of injunction, filed.

Dec. 1, 1971. Memorandum of law of the Penna. Assoc. of Independent Schools, filed.

Dec. 2, 1971. Plffs memorandum in support of motion for summary judgment and permanent injunction, filed.

Dec. 15, 1971. Argued sur plffs motion for summary judgment and for framing of injunction. C. A. V.

Dec. 28, 1971. Order of Court entering judgment for plaintiffs, with costs, and enjoining defts David H. Kurtzman and Grace Sloan from making payments, etc., to any school which is church related, etc., filed. (12/29/71 entered and copies mailed).

Jan. 6, 1972. Plffs bill of costs, filed.

Jan. 10, 1972. Plaintiffs' notice of appeal to the U. S. Supreme Court from final Order dated 12/28/71, filed.

Jan. 27, 1972. Plffs praecipe for writ of execution, filed. Writ exit.

Jan. 31, 1972. Record mailed to U. S. Supreme Court and notice sent to counsel.

Jan. 31, 1972. Plffs' amended notice of appeal, filed.

Jan. 31, 1972. Plffs' motion for supersedeas, filed.

Feb. 11, 1972. Plff's motion for supersedeas or stay, hearing on C. A. V.

Feb. 22, 1972. Opinion and Order restraining defts David H. Kurtzman (and his successor in office, John Pittinger) and Grace Sloan from making any payments under Act 109 for a period of 90 days, etc., filed. (2/23/72 entered and notice mailed).

Feb. 23, 1972. Appearance of David P. Bruton, Esq. for plffs, filed.

Feb. 28, 1972. Supplemental record mailed to U. S. Supreme Court.

Apr. 17, 1972. List of copies of documents forwarded to this Court by plffs counsel for transmission on appeal to U. S. Supreme Court, filed.

Apr. 18, 1972. Second supplemental record mailed to U. S. Supreme Court.

MOTION FOR SUMMARY JUDGMENT.

(Title Omitted in Printing.)

Now come the plaintiffs, by their attorney, Henry W. Sawyer, III, and move the Court for summary judgment and permanent injunction.

On June 28, 1971 the Supreme Court of the United States ruled that Act 109 was unconstitutional on its face, being in violation of the Establishment Clause of the First Amendment of the United States, on which basis they reversed and remanded.

WHEREFORE, the plaintiffs move the Court to enter judgment for the plaintiffs, with costs.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

ORDER FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

AND Now, this day of , 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in Lemon v. Kurtzman, No. 89, dated June 28, 1971, it is hereby

ORDERED that judgment be entered in favor of plaintiffs, with costs; and it is hereby

ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, are restrained from making any further payments under or pursuant to Act 109 (Act of June 19, 1968).

J.

DEFENDANTS' MOTION FOR DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

Defendants David H. Kurtzman, Grace Sloan and Defendant Schools have filed with the Court a Motion to Stay Further Proceedings herein. In the event that the Court should deny that Motion, then, in the alternative, said Defendants respectfully move the Court to deny Plaintiffs' Motion for Summary Judgment and Permanent Injunction. They assign therefor the following reasons:

1. The Supreme Court of the United States, on June 28, 1971, handed down a decision in this case, its opinion reversing the decision of the District Court and remanding the case for further proceedings consistent with this opinion.

2. The Supreme Court in its opinion held Act 109 (Act of June 19, 1968) "unconstitutional" in the limited sense of being unconstitutional in application—that is, as applied to Commonwealth contracts with particular schools possessing the disqualifying characteristics set forth in the opinion.

3. Those disqualifying characteristics may be summarized as follows:

> (1) being "an educational system that is very similar to the one existing in Rhode Island", that is, a system which has schools located near churches, schools in which religious symbols are displayed, religious extra-curricular activities are conducted, a high percent of teachers are nuns or persons in a religious profession, a religious atmosphere is created, supervision is by a bishop, or diocesan superintendent (or

possibly equivalent religious authority), and a handbook (or equivalent document) is employed which calls for the stimulating of religion in the school, and

(2) being controlled by a religious organization, and

(3) having the purpose of propagating and promoting a particular religious faith, and

(4) conducting operations to fulfill the purpose of propagating and promoting a particular religious faith.

4. Whether any of the seven Defendant Schools, or any other nonpublic school with which the Commonwealth has contracted pursuant to Act 109, possesses those characteristics which would render application of the Act to them unconstitutional involves genuine issues of material fact as to each, since the Act speaks only of "nonpublic" schools, and some of the contracting schools are nonsectarian, some are not part of any "educational system", some are Protestant, Jewish or Catholic schools which may have all, only some, or none of the features existing in the Catholic "educational system" found in Rhode Island; some are controlled by religious organizations and some are not; some do not have any purpose of propagating and promoting a religious faith; others have such a purpose but do not conduct their operations in such a way as to fulfill that purpose.

5. It would be totally improper and inequitable for this Court to foreclose to any school which has a contract under the Act its right to be heard and to present evidence with respect to whether or not it possesses the disqualifying characteristics, or to what extent it may possess them. Nothing in the Supreme Court opinion forecloses this right. The granting of Plaintiffs' Motion for Summary Judgment

and Permanent Injunction would constitute a denial of due process of law to every school in the Commonwealth which is not factually disqualified under the Supreme Court's prescription.

6. The pleadings in this case have not been closed. Defendants have not filed an Answer, but they desire to. There has been no trial in this case. No factual record proof is as yet before the Court with respect to whether any of the seven Defendant Schools, or any of the other contracting schools in Pennsylvania, possess the disqualifying characteristics. Such support is obviously not found in the fact that the allegations of the Complaint were admitted, because they were admitted solely for the limited purpose of testing the sufficiency of the Complaint upon Motion to Dismiss for Failure to State a Claim.

7. Where there are disputed issues of material fact a Summary Judgment is improper.

WHEREFORE, the Defendants David H. Kurtzman, Grace Sloan and Defendant Schools respectfully pray the Court to deny the Plaintiffs' Motion for Summary Judgment and Permanent Injunction.

Respectfully submitted,

J. SHANE CREAMER,

J. Shane Creamer,

Attorney General,
Attorney for Defendants, David H. Kurtzman and Grace Sloan.

WILLIAM B. BALL,

William B. Ball,

Attorney for Defendant Schools, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia, St. Anthony's School and Holy Ghost School and Philadelphia Montgomery Christian Academy.

INTERVENOR DEFENDANT'S MOTION FOR DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, intervenor defendant in the above captioned action, hereby joins in and incorporates by reference herein, Defendants' Motion for Denial of Plaintiffs' Motion for Summary Judgment and Permanent Injunction which has been filed by the defendants David H. Kurtzman, Grace Sloan and the named Defendant Schools.

HENRY T. REATH,
Henry T. Reath,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Defendants
Pennsylvania Association of
Independent Schools.

MOTION RE: FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

Defendants David H. Kurtzman and Grace Sloan and Defendant Schools have filed with the Court a Motion to Stay Further Proceedings and a Motion to Deny Plaintiffs' Motion for Summary Judgment. In the event that the Court should deny both said Motions and in the event that further action of the Court should be in the form of the issuance of an injunction, then, in the alternative, said Defendants move the Court to so frame any injunction as to direct the Defendants, David H. Kurtzman and Grace Sloan, to make the payments under Act 109 (Act of June 19, 1968) which payments the Commonwealth owes to certain nonpublic schools, including Defendant Schools, for services rendered by such schools under contracts for the previous year, 1970-1971. In support of this Motion, Defendants assign the following reasons:

1. Pursuant to the terms of Act 109, the Commonwealth of Pennsylvania, in 1970, entered into valid and binding contracts with certain nonpublic schools, including Defendant Schools, for the sale and purchase of secular educational services under the Act.

2. Prior to the time said contracts had been entered into, this Court had, on November 28, 1969, rendered a decision that the Act was constitutional. The majority opinion further recognized the validity of the contractual relationships. (See opinion of the District Court, 310 F. Supp. 35, 39.)

3. In reliance upon the validity of the Act and in reliance upon the Commonwealth's obligation to reimburse the schools pursuant to the contracts, the schools, including Defendant Schools, fully performed their obligations under the contracts by rendering secular educational services and

actually expending sums of money for teachers' salaries, textbooks and instructional materials. In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same. The Commonwealth of Pennsylvania is indebted to said Schools in the amounts provided for under the respective contracts. The Commonwealth of Pennsylvania is thus indebted to said schools in the amounts provided for under the respective contracts.

4. The applicable law provides that where a contract is entered into under a statute, and that statute is later held invalid, rights and obligations under the contract are not thereby destroyed where at the time of the making of the contract, the statute was presumed valid, where obligations were incurred in good-faith reliance upon the statute, and where there has been full performance of the contract obligations, the invalidating decision will be given prospective, not retroactive application.

WHEREFORE, Defendants David H. Kurtzman and Grace Sloan and Defendant Schools pray this Court to so frame any injunction as to direct the Defendants David H. Kurtzman and Grace Sloan to pay the debts of the Commonwealth to the schools for services rendered but yet unpaid for, pursuant to contracts entered into at a time when the Act was presumed valid and had been held valid by this Court, and to incorporate the following language into any such injunction:

"IT IS ORDERED AND DECREED that the Defendants David H. Kurtzman, as Secretary of Education, and Grace Sloan, as State Treasurer, shall make payments to those schools under contract with the Commonwealth of Pennsylvania for those secular educational services

already rendered during the school year 1970-71, and for which reimbursement has not been made, so that the Commonwealth of Pennsylvania may discharge its contractual debts."

Respectfully submitted,
J. SHANE CREAMER,
J. Shane Creamer,
Attorney General,
Attorney for Defendants David H. Kurtzman and Grace Sloan.

WILLIAM B. BALL,
William B. Ball,
Attorney for Defendant Schools Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia, St. Anthony's School and Holy Ghost School, and Philadelphia Montgomery Christian Academy.

MOTION RE: FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, intervenor defendant in the above captioned action, hereby joins in and incorporates by reference herein, Motion Re: Framing of Injunction which has been filed by the defendants David H. Kurtzman, Grace Sloan and the named Defendant Schools.

HENRY T. REATH,
Henry T. Reath,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Defendants
Pennsylvania Association of
Independent Schools.

ANSWER TO DEFENDANTS' MOTION RE FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

Plaintiffs make the following answer to the above Motion:

1. It is denied that any actions taken by the Commonwealth or any other persons pursuant to the terms of Act 109 are valid or binding.

2. Admitted.

3. It is denied that services were performed for the Commonwealth or that any debt exists from the Commonwealth. On the contrary, it is averred that the "contracts" and the alleged "purchase of services" was a fictional contrivance designed to avoid unconstitutionality and that this conclusion is an inherent ingredient of the decision of the Supreme Court of the United States.

4. Insofar as this paragraph is a statement of law, plaintiffs are advised that they need not respond. Insofar as it is a statement of fact as to what the law is, plaintiffs deny that the law is as stated by the defendants.

New Matter.

5. Payment of additional funds under Act 109 is barred by the decision of the United States Supreme Court.

6. Throughout the hearings on the Act, debate in the Legislature, the statement of the governor in signing the Act, and the legal proceedings, the defendants were on notice that the constitutionality of the Act was highly questionable. To the extent that any acts were done or expendi-

tures made in reliance thereon, the parties proceeded at their own risk.

WHEREFORE, plaintiffs pray the Court to enjoin any further payments under Act 109.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

ORDER.

(Title Omitted in Printing.)

AND Now, this 18th day of August, 1971, upon consideration of the motion of defendants for a stay of proceedings pending disposition by the Supreme Court of the United States of the "Petition of Appellees for Rehearing and Supplemental Opinion", and counsel for plaintiffs having filed a consent to "a stay of all proceedings and any and all actions pursuant to Act 109", IT IS ORDERED that the motion is GRANTED and all proceedings and any and all actions pursuant to Act 109 (Act of June 19, 1968) are stayed pending disposition of the aforementioned petition by the Supreme Court of the United States.

WILLIAM H. HASTIE,
Circuit Judge.

ALFRED L. LUONGO,
District Judge.

E. MAC TROUTMAN,
District Judge.

For the Court,
E. MAC TROUTMAN, *J.*

ANSWER OF THE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS TO PLAINTIFFS' NEW MATTER.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, by its attorneys, hereby responds to Plaintiffs' New Matter as follows:

1. The Pennsylvania Association of Independent Schools denies each and every allegation contained in Plaintiffs' New Matter.

ROBERT L. PRATTER,
Henry T. Reath,
Robert L. Pratter,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for the Pennsylvania Association of Independent Schools.

MOTION OF DEFENDANTS TO MODIFY ORDER FOR STAY OF PROCEEDINGS AND TO SCHEDULE ORAL ARGUMENT.

(Title Omitted in Printing.)

Defendants, by their respective attorneys, hereby move the Court to modify its Order of August 18, 1971 so as to permit the briefing, oral argument and decision on the Defendants' Motion Re: Framing of Injunction. In support thereof, they assign the following reasons:

1. On August 13, 1971, Defendants filed three Motions: a Motion to Stay All Proceedings, a Motion to Deny Plaintiffs' Motion for Summary Judgment, and a Motion Re: Framing of Injunction. Each Motion raised different considerations and questions of law for resolution by this Court.

2. On August 18, 1971, this Court entered an Order staying all proceedings, pending the disposition of a Petition for Rehearing which Defendants had filed in the Supreme Court of the United States.

3. In good-faith reliance upon the fact that Act 109 had been declared constitutional by this Court, nonpublic schools in Pennsylvania, including Defendant Schools, had entered into contracts with the Commonwealth under that Act for the school year, 1970-1971, and at the conclusion of that school year had fully performed all of their obligations thereunder.

4. The applicable law provides that where a contract is entered into under a statute, and that statute is later held invalid, rights and obligations under the contract are not thereby destroyed where at the time of the making of the contract, the statute was presumed valid, where obligations were incurred in good-faith reliance upon the statute, and

where there has been full performance of the contract obligations. The invalidating decision will be given prospective, not retroactive, application.

5. Defendant Schools and other nonpublic schools throughout the Commonwealth which are now legally entitled to be reimbursed under the Act for the school year 1970—1971 are in urgent need of funds. The withholding of payments has created budget deficits, previously unanticipated, which now threaten, or seriously impair, these schools' present and future operations. Some of these schools will in fact be forced to close their doors and to cease performance of their work of educating Pennsylvania children if they do not soon receive the financial aid which they are now entitled.

6. Since August 13, 1971, the need of the schools for these funds has become acute; each day that passes without the use of this money escalates what is already a critical financial crisis. As a result, Defendant Schools request this Court to proceed to determination of the issues raised in its Motion Re: Framing of Injunction.

7. The issue raised by the Motion, namely, whether under equitable principles the Schools shall be paid for services rendered for the academic year 1970-1971, is not before the United States Supreme Court in the Defendants' Petition for Rehearing. Moreover, it is a decision which this Court must make in the first instance regardless of the disposition made by the Supreme Court of Defendant Schools' Petition.

8. The Treasurer of the Commonwealth of Pennsylvania, Defendant Sloan, possesses funds sufficient to make such payment which are earmarked therefor and can be disbursed to the said nonpublic schools immediately.

WHEREFORE, Defendants respectfully pray the Court to modify its Order of August 18, 1971 insofar as the said Order would preclude this Court's proceeding to a determination of Defendants' Motion Re: Framing of an Injunction and to enter an Order setting the Motion down for argument.

J. SHANE CREAMER,
J. Shane Creamer,

Attorney General of the Commonwealth of Pennsylvania for Defendants Kurtzman and Sloan.

WILLIAM B. BALL,
William B. Ball,

Attorney for Defendants, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia.

C. CLARK HODGSON, JR.
C. Clark Hodgson, Jr.,
JAMES E. GALLAGHER, JR.,
James E. Gallagher, Jr.,

Attorneys for Defendants, St. Anthony's Roman Catholic School, Ukranian Catholic School.

HENRY T. REATH,
Henry T. Reath,

for DUANE MORRIS & HECKSCHER,
Attorneys for the Pennsylvania Association of Independent Schools.

ORDER.

AND NOW, this of Sepetember, 1971, upon consideration of Defendants' Motion to modify this Court's Order of August 18, 1971, it is hereby ORDERED, ADJUDGED and DECREED that the stay of proceedings heretofore entered by this Court on August 18, 1971 be and it is hereby MODIFIED so as to proceed to a determination of Defendants' Motion Re: Framing the Injunction.

IT IS FURTHER ORDERED that argument on the said motion shall be held on the day of , 1971; briefs shall be filed and served by all parties on or before the day of , 1971.

BY THE COURT:

J.

Supreme Court of the United States

No. 71-1470

Alton J. Lemon et al.,

Appellants,

v.

David H. Kurtzman, etc., et al.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 22, 1972

71-1470

FILED

MAY 10 1972

IN THE

Supreme Court of the United States

October Term, 1971.

No. .

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

Of Counsel:

[illegible] L. Weis,
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American Civil Liberties Union Foundation,
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TABLE OF CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC., *Plaintiffs-Appellants,*

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA, *Defendants-Appellees,*

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INTRODUCTION.

Appellants appeal from the final Order of December 28, 1971 by a District Court Panel of three judges of the Eastern District of Pennsylvania, granting plaintiffs-appellants' motion for summary judgment and partially granting plaintiffs-appellants' motion for a permanent injunction on the basis of the decision of the Supreme Court of the United States entered in this action on June 28, 1971, *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The Order of the three-judge court gave only prospective effect to the decision of this Court, in that the permanent injunction restrained disbursements of public funds to religious or church related schools pursuant to Act 109 of the Laws of Pennsylvania, known as the Nonpublic Elementary and Secondary Education Act (hereinafter called "Act 109"), only with respect to services performed or costs incurred subsequent to June 28, 1971. Thus the three-judge court denied, *sub silentio*, appellants' motion for permanent injunction insofar as it sought to restrain reimbursements not yet made under the Act for services performed or costs incurred prior to June 28, 1971. This appeal is taken from the latter aspect of the District Court's order.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW.

The opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

Copies of the Order of said court entered December 28, 1971, and the Opinion and Order subsequently issued by said court on February 22, 1972[1] are attached hereto as an Appendix (1 app-11 app, *infra*).

1. The Order entered on February 22, 1972 is erroneously dated February 22, 1971.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. A final decree of the three-judge court granting defendants' motion to dismiss for failure to state a claim was entered on November 28, 1969, and a timely appeal was thereafter taken by appellants to the Supreme Court of the United States. On June 28, 1971, the decision of the three-judge court was reversed by the Supreme Court, and the case was remanded for further proceedings consistent with the opinion of the Supreme Court.

Appellants thereafter moved for summary judgment and a permanent injunction. A final Order without opinion was issued by the three-judge court on December 28, 1971, entering summary judgment for plaintiffs and granting partial injunctive relief as set forth above. Notice of Appeal was filed in the District Court on January 10, 1972, and amended on January 31, 1972 (20 app, 21 app, *infra*). On February 14, 1972, appellants made application to Mr. Justice Brennan for an extension of time for docketing appeal pursuant to Rule 13. By Order dated February 17, 1972, Mr. Justice Brennan extended the time to docket appeal to and including May 10, 1972. On February 22, 1972, an opinion was issued by the three-judge District Court in support of the Order entered on December 28, 1971.

The jurisdiction of the Supreme Court of the United States to review the Order of December 28, 1971 by direct appeal is conferred by 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952).

STATUTE INVOLVED.

The statute of Pennsylvania which was held unconstitutional by this Court in *Lemon v. Kurtzman, supra*, is entitled "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. (Purdon) § 5601, et seq., and is set forth in Appendix A to the majority opinion of the three-judge court in *Lemon v. Kurtzman*, 310 F. Supp. 35, 55-58 (E. D. Pa. 1969). It is also set forth in the Appendix attached hereto (12 app-19 app, *infra*).

The statute provided that a portion of the proceeds of a certain tax on horse racing should, under the direction of the Superintendent of Public Instruction, be used for reimbursement to nonpublic schools for the "purchase" of certain defined educational services. The payments in reimbursement for the cost of these services were to be made after the close of the school year in which the services were provided.

QUESTION PRESENTED.

The three-judge court has held that, although Act 109 was found unconstitutional on its face by this Court, nonetheless public funds now held by the State of Pennsylvania under Act 109 must be paid out to reimburse such schools for services performed or costs incurred prior to June 28, 1971 when the Act was declared unconstitutional.

A single question is presented:

> Does the Supreme Court's decision that Act 109 is unconstitutional on its face prohibit subsequent disbursement of public funds under the Act to religious schools for the costs of "secular educational services" provided by those schools before the Act was held unconstitutional?

STATEMENT.

This appeal results from the continuing efforts of the supporters of state financial aid to religious or church related schools to find some means of evading the constitutional barriers to such aid imposed by the First Amendment. On June 19, 1968, Act 109 of the Laws of Pennsylvania became effective. Within one month, appellants publicly announced their intention to challenge the constitutionality of the Act, and on July 3, 1969, a complaint was filed in this action.

The statutory scheme which was the target of this litigation called for a financial subsidy to nonpublic schools using public funds derived from a special tax. This subsidy was described in the Act as a "reimbursement" to nonpublic schools for the costs of providing certain defined "secular educational services." Reimburseable items included teachers' salaries, textbooks and teaching materials in the subjects of mathematics, modern foreign languages, physical science, and physical education. The statutory method of reimbursement contemplated that nonpublic schools would, in the language of the Act, enter into "contracts" for the "purchase of services". Payments were not to be made, however, until after the school year in which the "services" were provided.

On November 28, 1969, the three-judge District Court ruled, in a 2-1 decision (Hastie, Chief Circuit Judge, dissenting) that the Act was constitutional. Plaintiffs thereafter filed a Notice of Appeal to the United States Supreme Court on December 17, 1969. Not until January 15, 1970, following the filing of this Notice of Appeal from the decision of the three-judge court, did the nonpublic schools renew their "contracts" for reimbursement under the Act for "services" to be rendered during the 1970-71 school year. The Supreme Court noted probable jurisdiction of

the appeal on April 20, 1970, prior to the commencement of the 1970-71 school year.

On June 28, 1971, this Court handed down its decision on the appeal, reversing the District Court and declaring the Act unconstitutional on its face on the ground that it necessarily fostered excessive entanglement between church and state and, in the view of at least three members of the Court, supported the establishment of religion,[2] all in contravention of the First Amendment, *Lemon v. Kurtzman, supra.* The case was remanded for further proceedings consistent with the opinion.

Appellants therefore moved for summary judgment and a permanent injunction. Appellees, after first contending that further pleadings and evidence were required in order to determine whether the statute was unconstitutional as applied, then insisted that the nonpublic schools were still entitled to reimbursement under the unconstitutional Act for costs incurred in the 1970-71 school year, on the ground that the schools had acquired vested "contractual rights" which should not be affected by the decision of the Supreme Court. If appellees' position is sustained, the State of Pennsylvania will be obliged to expend approximately $23 million as a subsidy for the operation of nonpublic schools during the 1970-71 year, although this Court has already concluded that such payments would, on their face, create an entangling relationship between church and state in violation of the First Amendment.

Appellants contended in the court below that the normal rule of retroactivity of judicial decisions should apply here; that the rationale of *Lemon v. Kurtzman, supra,* prohibited the payments in question; that no prior decision of this Court compelled or even suggested that *Lemon v.*

2. See separate opinion of Justice Brennan, 403 U. S. at 658, and concurring opinion of Justices Douglas and Black, 403 U. S. at 637. See also the opinion of the Court, 403 U. S. at 621.

Kurtzman be applied only on a prospective basis; and that extending the limited doctrine of prospectivity to this situation would have potentially profound adverse consequences in the broad area of constitutional adjudication involving expenditures of public funds.

The three-judge court, in its opinion issued February 22, 1972, in support of its Order of December 28, 1971, rejected appellants' arguments. It concluded that the old "Blackstonian" view of absolute retroactivity of judicial decisions is no longer viable; that, as stated by this Court in *Linkletter v. Walker,* 381 U. S. 618, 628 (1965), the current view is that "in appropriate cases the Court may in the interest of justice make the rule prospective"; that the standard for determining whether to allow retrospective application is no different in the area of constitutional adjudication than in any other area of law; and that the decision of this Court in *Lemon v. Kurtzman, supra,* must be examined to determine whether prospective application "would in any way undermine its underlying basis and its rationale and, if not, then [the court must] balance the equities between the parties." 7 app, *infra.*

Applying the foregoing approach, the three-judge court decided that "excessive entanglement" was the exclusive constitutional infirmity articulated by this Court in striking down Act 109, that this doctrine was intended primarily to avoid *future* entanglement and encroachment, and that subsequent reimbursements for costs incurred by nonpublic schools prior to the Supreme Court's decision would not offend the rationale of that ruling. The lower court then turned to a "balancing of the equities" between the parties and determined that a greater hardship would result to appellees if the funds were withheld, than would result to appellants if the funds were expended. Thus, the lower court concluded that the prior decision of this Court should

be limited to a prospective application, notwithstanding the admitted facts that (a) the nonpublic schools did not make arrangements to seek the reimbursements in question under the Act until *after* an appeal challenging the constitutionality of this highly controversial statute had already been filed with the Supreme Court, and (b) the "services" in question were not rendered until this Court had already noted probable jurisdiction of the appeal.

The lower court recognized that there were probable grounds for an appeal by appellants, and granted an injunction pending appeal restraining expenditure by the state of the funds in question for a period of ninety days, in order that appellants could resubmit the question to this Court before the issue was mooted. 10 app-11 app, *infra*.

THE QUESTION IS SUBSTANTIAL.

The Supreme Court should take jurisdiction of this case in order that it may vacate that portion of the Order dated December 28, 1971, which, *sub silentio*, denies appellants' motion for a permanent injunction restraining future payments under Act 109 in reimbursement of costs incurred by religious or church related schools prior to June 28, 1971. The issue upon which review is sought is substantial, for two reasons.

First, appellants assert that the lower court has misinterpreted this Court's decision in *Lemon v. Kurtzman, supra*, in concluding that the decision should have only prospective application to Act 109. The fundamental vice of Act 109, as explained by this Court, is that the statutory scheme cannot be carried out without entangling church and state in myriad ways forbidden by the First Amendment. The Court enumerated some of the specifics of this entanglement: state surveillance would be required to insure that teachers, the cost of whose salaries would be reimbursed in whole or in part by the state, would play a strictly nonideological role; the subject matter of the courses offered for reimbursement under the Act would have to be examined to insure that they did not contain any subject matter expressing religious teachings, or the morals or forms of worship of any sect; and the direct subsidy provided to nonpublic schools under the Act would necessarily require further government controls and review to determine from the records of each nonpublic school that the costs for which reimbursement was sought were secular rather than religious.[3]

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3. Section 3(3) of the Act defines "secular subject" to exclude "any subject matter expressing religious teaching, or the morals or forms of worship of any sect", 14 app, *infra*, and Section 7(a) of the Act subjects the accounts of all nonpublic schools to audit by the Auditor General of Pennsylvania to insure compliance with the statute, 18 app, *infra*.

Contrary to the lower court's view, all of the foregoing considerations apply just as much to future reimbursements of costs already incurred by nonpublic schools as they would apply to future reimbursements for costs not yet incurred. The fact is that the State of Pennsylvania would have to engage in precisely the kind of entangling inquiry and surveillance of religious and church related schools that was explicitly forbidden by this Court in *Lemon v. Kurtzman,* in order now to determine whether and how much each nonpublic school can be reimbursed for costs incurred during 1970-71. In addition, the lower court did not even consider whether the fact that Act 109 violates the establishment clause of the First Amendment as pointed out by the separate and concurring opinions in *Lemon v. Kurtzman,* can be squared with permitting additional disbursements under the Act. It is therefore appellants' position that the lower court has fundamentally misconstrued the decision of this Court in *Lemon v. Kurtzman* and this erroneous interpretation should now be corrected.[4]

The second reason why the question here presented is substantial transcends the immediate confines of this litigation. The decision of the lower court marks a significant deviation from the doctrines which have heretofore guided the Supreme Court in determining when an exception should be made to the normal rule of retroactivity of judicial decisions of unconstitutionality, a rule which in the words of Justice Black, constitutes "one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking . . ." *James v. United States,* 366 U. S. 213, 225 (1960) (dissenting opinion).

4. Appellants are not contending that nonpublic schools must return funds already disbursed under the Act. Whatever improper entanglements occurred as a result of prior disbursements cannot now be undone, in contrast to constitutional difficulties presented by disbursements not yet made.

Appellants fully realize that there is no absolute rule of retroactivity of judicial decisions. But the exceptions to the rule have been few. The touchstone for these exceptions has been "substantial inequitable results" produced by retroactivity. *Cipriano v. City of Houma*, 395 U. S. 701, 706 (1969). The most common circumstances where prospectivity has been found appropriate are (1) where the Supreme Court has reversed its own prior decisions in the field of criminal procedure, e.g., *Linkletter v. Walker, supra*, which held *Mapp v. Ohio*, 367 U. S. 643 (1961) to have only prospective application; and (2) where statutes authorizing bond issues have been invalidated, raising a question as to whether prior purchasers of the bonds would be forced to forfeit their investment, e.g., *Cipriano v. City of Houma, supra; Douglas v. County of Pike*, 101 U. S. 677 (1879). In other instances, this Court has discussed the question of retroactivity in general terms, while deciding the case on other grounds. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940).

But here the lower court has radically expanded the doctrine of prospectivity to permit further payments pursuant to an unconstitutional statute. Act 109 was not declared void on its face because this Court was overruling its own prior decisions; on the contrary, *Lemon v. Kurtzman* is but the most recent judicial declaration that the First Amendment does not permit public funds to be used to subsidize the operations of religious or church related schools. Nor were the Pennsylvania nonpublic schools unaware, when they made arrangements for reimbursements under Act 109 for the 1970-71 school year, that the Act was under direct constitutional attack. Quite the opposite. Notice of an appeal from a 2-1 decision in the three judge court had already been filed with this Court. Probable jurisdiction had been noted by this Court more than four months prior to the rendering of any "services" for which reimbursement is now sought. Under these circumstances, the

posture of the nonpublic schools is scarcely that of innocent reliance. A more accurate view is that the schools simply gambled on trying to get what they could from the state so long as Act 109 was still on the books.

The lower court has stressed that the interests of justice require a prospective application of *Lemon v. Kurtzman* because the nonpublic schools entered into reimbursement "contracts" with the state and performed services in reliance on these "contracts". Yet the lower court found it unnecessary to pass upon appellants' contention that the term "contract" is a statutory misnomer used merely as window dressing for what is in fact a subsidy. Rather, the court simply concluded that the nonpublic schools justifiably relied on the constitutionality of Act 109 and that the denial of reimbursement for 1970-71 would impose a "substantial burden [on them] which would be difficult for them to meet". 10 app, *infra*.

In so doing, the lower court has resurrected and adopted an argument of appellees that was implicitly rejected out of hand by this Court in *Lemon v. Kurtzman, supra;* i.e., that state aid to parochial schools is justified because their financial situation is desperate. The implication is that the nonpublic schools incurred costs in the expectation of future reimbursement, and that these costs would not have been incurred without that expectation. Passing the question whether such expectation was reasonable in the light of a pending appeal to this Court, appellants contend that this view cannot be accepted unless the entire linguistic scheme of the statute ("contracts" for the "purchase" of "services") is adopted at face value as a description of reality which the courts cannot look behind.

Yet this is precisely what the Supreme Court declined to do in *Lemon v. Kurtzman,*[5] and the reluctance is under-

5. In *Lemon v. Kurtzman, supra,* this Court used quotation marks around the word "contract", and throughout all of the opinions the terms "aid" and "subsidy" are constantly used to describe the statutory payment scheme.

standable. Consider the potential implications in the field of constitutional litigation. Would "contracts" with a state for "services" rendered by "private" segregated schools have to be honored so long as they were entered into prior to a judicial declaration that such a scheme is unconstitutional? What incentive would thereby be given to legislatures seeking devices, however temporary, for avoiding constitutional obligations?[6]

All of the foregoing considerations, appellants submit, demonstrate the substantiality of the question here presented.

Respectfully submitted,

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6. It is noteworthy that the Pennsylvania legislature, within two months after the decision of this Court in *Lemon v. Kurtzman*, passed a new statute calling for a direct state subsidy to all parents whose children attend nonpublic schools. Act 92 of the Pennsylvania General Assembly, August 27, 1971. A three judge court has recently held the statute unconstitutional on its face under the First Amendment. *Lemon v. Sloan*, E. D. Pa., Civ. Action No. 71-2223, April 6, 1972.

Appendix.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ETC., ET AL.

ORDER.

AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman,* dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for

any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Education Act (24 PS § 5601-5609) to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,

WILLIAM H. HASTIE,
William H. Hastie, Circuit Judge,
ALFRED L. LUONGO,
Alfred L. Luongo, District Judge,
E. MAC TROUTMAN,
E. Mac Troutman, District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ET AL.

OPINION AND ORDER.

Pursuant to the decision of the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), this Court entered summary judgment in favor of plaintiffs and restrained payments to church-related schools under the Nonpublic Elementary and Secondary Education Act, 42 [sic] P. S. §§5601-5609, for services performed or costs incurred subsequent to June 28, 1971.[1] At that time, the issue before

1. On remand from the Supreme Court, we entered the following order:

"AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman*, dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Education Act (24 PS § 5601-5609) to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,
s/ William H. Hastie, Circuit Judge
s/ Alfred L. Luongo, District Judge
s/ E. Mac Troutman, District Judge."

the Court was whether church-related schools in Pennsylvania which provided secular educational services to non-public school children during the school year 1970-1971 were entitled to reimbursement for those services rendered, notwithstanding the decision of the Supreme Court in this case. We concluded that the church-related schools were entitled to such reimbursement for the reasons hereinafter stated.

The initial dispute between plaintiffs and defendants concerned the legal standard to be applied in determining this issue. Plaintiffs argued, on the one hand, that once a statute has been declared unconstitutional, it is void *ab initio* and "contracts" which depend upon it for their consideration are void. On the other hand, defendants argued that no such principle of absolute retroactivity exists and the question whether a determination of the unconstitutionality of a statute be retroactively applied must be governed by certain considerations in order to obviate any hardship and injustice. Defendants further argue that applying this standard to the facts of this case, the non-public schools are entitled to reimbursement for the school year 1970-1971.

Plaintiffs espouse the "Blackstonian" view,[2] which was followed by the Supreme Court in *Norton v. Shelby County*, 118 U. S. 425 (1886), wherein the Court held that

2. The Blackstonian view was succinctly summarized in 16 C. J. S. § 101(a) where it was stated:

> ". . . [b]roadly, an unconstitutional statute is void, at all times and its invalidity must be recognized or acknowledged for all purposes, or as applied to any state of facts, and is no law, or not a law, or is a nullity, or of no force or effect, or wholly inoperative. Generally speaking, a decision by a competent tribunal that a statute is unconstitutional has the effect of rendering such statute null and void; the act, in legal contemplation, is as inoperative as though it had never been passed or as if the enactment had never been written, and it is regarded as invalid, or void, from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed". 118 U. S. at 442. The general rule underwent a gradual erosion, culminating in the 1930s with *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940).[3] In *Great Northern*, the Court rejected the argument that the Constitution was abridged by the lower court's refusal to apply its ruling retroactively, holding at page 364:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co. v. Flanagan* [263 U. S. 444]) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." (citations omitted)[4]

Similarly, in *Chicot*, the Court asserted that broad statements as to the effect of a determination of unconstitutionality, such as that in *Norton v. Shelby County, supra*, must be taken with qualifications. The Court further stated at page 374:

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3. For a concise history of the evolution of the law on retrospective application, see *Linkletter v. Walker*, 381 U. S. 618, 622-629 (1965).

4. It should be noted that the Pennsylvania courts have rejected an absolute application of the Blackstonian view. See *DeMartino v. Zurich Ins. Co.*, 307 F. Supp. 571, 573 (W. D. Pa. 1969); *Box Office Pictures v. Board of Finance and Revenue*, 402 Pa. 511 (1961); *Buradus v. Gen'l Cement Products Co.*, 159 Pa. Super. 502 (1946), *aff'd.* 256 Pa. 349 (1947).

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Whatever vestige of the "Blackstonian" view of absolute retroactivity remained after *Great Northern* and *Chicot* was ultimately laid to rest by the Supreme Court in *Linkletter v. Walker*, 381 U. S. 618 (1965),[5] wherein the Court held that "the accepted rule today is that in appropriate cases the Court may, in the interest of justice, make the rule prospective". 381 at 628.

Plaintiffs, however, argue that the law does not permit the recognition of the validity of any action taken under a statute which was declared unconstitutional on its face. This contention was aptly answered by the Court in *Linkletter*, which was faced with this identical question at pages 628 and 629:

> "Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of

5. Although *Linkletter* involved a constitutional issue of criminal procedure, it established that this rule applies to both civil and criminal litigation. *Linkletter v. Walker*, 381 U. S. at 627.

retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Carodozo said, 'We think the federal constitution has no voice upon the subject'."

Consequently, no different standard of retrospective application is to be applied in the area of constitutional adjudication than in any other area of law.

In order to determine whether agreements to reimburse church-related schools made prior to the Court's decision in this case may be performed, we must "weigh the merits and demerits in [this] case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629. We must further consider "questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of the statute and of its previous application", *Chicot County Drainage District v. Baxter State Bank, supra,* at 374, in addition to equitable considerations of hardship and injustice. *Great Northern R. Co. v. Sunburst Oil & Refining Co., supra,* at 364. Thus, we must examine the decision of the Supreme Court in this case to determine whether prospective application would in any way undermine its underlying basis and its rationale and, if not, then balance the equities between the parties.

In *Lemon,* the Supreme Court summarized its three-pronged test applicable where statutes are challenged under the Establishment Clause of the First Amendment:

> "First, the statute must have a secular legislative purpose; second, its principle [sic] and primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U. S. 236, 243 (1968);

> finally, the statute must not foster 'an excessive government entanglement with religion'. *Walz v. Tax Comm'n*, 397 U. S. 664 (1970)."

As to the initial test, the Court held that the Pennsylvania statute had a secular legislative purpose in that it was designed to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. 403 U. S. at 613. Secondly, the Court found it unnecessary to decide whether the principal or primary effect of the statute advanced or inhibited religion, 403 U. S. at 613-614, thus leaving undisturbed this Court's finding that the Act did not have such effect. 310 F. Supp. at 47. Thereafter, the Court clearly manifested that the basis of its decision was the "excessive entanglement between government and religion" generated by the Act. 403 U. S. at 614. The articulated objectives of the Court's entanglement doctrine are, first, "to prevent, as far as possible, the intrusion of either [government or religion] on the precincts of the other", 403 U. S. at 614, and, secondly, to avoid potential political divisiveness along religious lines. 403 U. S. at 622. With the decision of the Supreme Court in this case and this Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools, the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved. Thus, permitting the allocated funds to be distributed for the 1970-71 school year, would in no way offend the entanglement doctrine as enunciated by the Supreme Court. The Court's emphasis on the "resulting relationship between the government and religious authority", 403 U. S. 615, indicates that its primary concern was the potential for *future* entanglements and encroachments. Since the potential for any future state intrusion into the reli-

gious domain has been eliminated, reimbursement for expenditures made prior to the Supreme Court's decision would in no way run afoul of that ruling. Similarly, since the funds have already been collected and allocated, there is no possibility of future political division along religious lines. To summarize, we concluded that to permit such payment would not undermine the Supreme Court's decision or foster the entanglement or the political dissension feared by the Court.

As previously mentioned, we must now balance the equities between the parties in order to determine whether any hardship or injustice would result from either a prospective or retrospective application of the Supreme Court's decision. As to the plaintiffs, there is no indication that a ruling that the decision is to be applied retrospectively would result in any hardship or injustice. The state has already collected the funds to be allocated to the non-public schools and plaintiffs' contribution to this fund has been de minimis.

As to the defendants, the State has entered into "contracts"[6] with some 1,181 non-public elementary and secondary schools. In reliance on these "contracts", the non-public schools adjusted their budgets accordingly and performed the services required by them. There is no doubt that such reliance was justified by the presumption of constitutionality which attached to the Act upon its signing into law, *Philadelphia v. Depuy*, 431 Pa. 276 (1968) and, a fortiori, by the decision of this Court, in the first instance, holding the Act constitutional. There is no dispute that to deny the church-related schools any reimbursement for

6. Plaintiffs argue that the term "contracts", as applied to these transactions, is misleading and that the payment of funds is, in fact, a subsidy. In the first instance, this Court rejected this argument, 310 F. Supp. at 39-40. In its opinion, the Supreme Court apparently accepted this interpretation. 403 U. S. at 610. At any rate, whether the reimbursements constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it

their services rendered would impose upon them a substantial burden which would be difficult for them to meet. To avoid this hardship, we concluded the funds allocated to reimburse the non-public schools for services rendered in the school year 1970-1971 may be paid.

Accordingly, our order of December 28, 1971, was issued, entering summary judgment in favor of plaintiffs and restraining payments for services performed and costs incurred for any period subsequent to June 28, 1971.

Before the Court at this time is plaintiffs' motion for supersedeas. Plaintiffs argue that unless the Commonwealth of Pennsylvania is restrained from making payments pursuant to Act 109 for services performed and costs incurred for the school year 1970-1971, the state officials may make the payment, thus mooting the issue and, in essence, denying plaintiffs the right to an effective appeal. Since plaintiffs do not intend to post a supersedeas bond as required by Rule 62(d) F. R. Civ. P., and since plaintiffs are appealing from a final order, in effect, denying them an injunction, restraining payments to church-related schools pursuant to Act 109 for the school year 1970-1971, we have construed this motion for supersedeas as a motion for an "injunction pending appeal" pursuant to Rule 62(c), F. R. Civ. P. In a Rule 62(c) motion, upon a consideration of all the facts, we must ask: "would harm result to either party as a result of the granting or denial of the stay, and were there probable grounds for an appeal to protect rights which might be prejudiced by a refusal to grant the stay?" *Shinholt v. Angle,* 90 F. 2d 297 (5th Cir. 1967). *See also*

6. (Cont'd)

lessen the reliance of the non-public schools on the payments or the subsequent hardship upon them if the payments are not made. Defendants have raised the issue of the standing of plaintiffs to argue that these transactions did not constitute contracts. In so holding, we need not decide this issue.

7 Moore's Federal Practice 1365. We agree with plaintiffs that if the monies were paid by the state, the issue would be mooted, and plaintiffs would be denied their right to appeal. Accordingly, we will restrain and enjoin any payment under Act 109 for a period of 90 days, thus giving plaintiffs the opportunity to resubmit this question to the Supreme Court.

ORDER.

And Now, this 22nd day of February, 1971 [sic], It Is Ordered that the defendants David H. Kurtzman (and his successor in office, John Pittinger), Superintendent of Public Instruction, and Grace Sloan, Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined, for a period of ninety (90) days from the date hereof, from making payments for services performed or costs incurred for any period prior to June 28, 1971, under and pursuant to Act 109, entitled the Non-public Elementary and Secondary Education Act, 24 P. S. §§ 5601-5609, to any school which is church-related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

By THE COURT,

/s/ William H. Hastie,
William H. Hastie,
Circuit Court Judge.

/s/ Alfred L. Luongo,
Alfred L. Luongo,
District Court Judge.

/s/ E. Mac Troutman,
E. Mac Troutman,
District Court Judge.

PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT.

§ *5601. Short title.*

This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act." 1968, June 19, P. L. —, No. 109, § 1.

Title of Act:

An act to promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds. 1968, June 19, P. L. —, No. 109.

§ *5602. Legislative finding; declaration of policy.*

It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national im-

perative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty percent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

1968, June 19, P. L. —, No. 109, § 2.

§ *5603. Definitions.*

The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

1968, June 19, P. L. —, No. 109, § 3.

§ *5604. Nonpublic Elementary and Secondary Education Fund.*

There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

1968, June 19, P. L. —, No. 109, § 4.

§ *5605. Administration.*

The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money used for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

1968, June 19, P. L. —, No. 109, § 5.

§ *5606. Moneys for Fund.*

(a) Permanent Moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331),[1] remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of section 18 of that act,[2] plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary Moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in

1. 15 P. S. § 2651 et seq.
2. 15 P. S. § 2668.

a given fiscal year, have been paid into the Nonpublic Elementary and Secondary Education Fund as provided for under subsection (a) of section 6 hereof,[3] three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended,[4] remaining after and not required for, the payments provided for in subsections (b) and (d) of section 16 of that act,[5] shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,000).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative expenses pertaining thereto as provided for in section 5 of this act.[6]

1968, June 19, P. L. —, No. 109, § 6.

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3. This section.
4. 15 P. S. § 2601 et seq.
5. 15 P. S. § 2616.
6. Section 5605 of this title.

§ *5607. Reimbursement Procedures.*

(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruc-

tion, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

1968, June 19, P. L. —, No. 109, § 7.

§ *5608. Effective Date.*

This act shall take effect July 1, 1968.

1968, June 19, P. L. —, No. 109, § 8.

§ *5609. Severability.*

If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or [1] more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

1968, June 19, P. L. —, No. 109, § 9.

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1. Enrolled bill reads "of".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.,

Plaintiffs,

v.

DAVID H. KURTZMAN, ETC., ET AL.,

Defendants.

NOTICE OF APPEAL.

Notice is hereby given that plaintiffs in the above-captioned matter, Alton J. Lemon, Priscilla Reardon, Betty J. Worrell, Pennsylvania State Education Association, Pennsylvania Conference National Association for the Advancement of Colored People, Pennsylvania Council of Churches, Pennsylvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and American Civil Liberties Union of Pennsylvania, Inc., appeal to the Supreme Court of the United States from the final Order dated December 28, 1971.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
1100 PNB Building,
Philadelphia, Pa. 19107
Attorney for Appellants.

January 10, 1972.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.,

Plaintiffs,

v.

DAVID H. KURTZMAN, ETC., ET AL.,

Defendants.

AMENDED NOTICE OF APPEAL.

The Notice of Appeal filed on January 10, 1972 is hereby amended to state that the appeal is taken pursuant to 28 U. S. C. 1253.

Henry W. Sawyer, III,
Attorney for Plaintiffs-Appellants.

January 31, 1972.